BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Application No. 9 of 2014

BETWEEN:

CGI CONSUMERS GUARANTEE INSURANCE CO. LTD.	**Intended/ Appellant**
AND	
TRIDENT INSURANCE CO. LTD.	**Intended/ Respondent**

BEFORE: The Hon. Sherman R. Moore, CHB, The Hon. Andrew D. Burgess and The Hon. Kaye C.A. Goodridge, Justices of Appeal.

2014: September 19, December 5
2016: February 16

Mr. Leslie F. Haynes, QC and Ms. Faye Finisterre, Attorneys-at-Law for the Intended Appellant
Mrs. Marguerite Woodstock-Riley, QC and Ms. Lydia Farley, Attorneys-at-Law for the Intended Respondent

DECISION

BURGESS JA

INTRODUCTION

[1] This case concerns three applications spawned by an order made by **Sir Marston Gibson CJ** sitting as a single judge, granting the defendant/

intended appellant, Consumers Guarantee Insurance Company Ltd. (CGI) leave to appeal out of time, a decision of **Worrell J** denying CGI leave to amend its defence. The first application is by the claimant/intended respondent, Trident Insurance Co. Ltd. (Trident), seeking to have the order of **Sir Marston Gibson CJ** discharged as being made without jurisdiction. The second is by CGI requesting that the order be varied so as to allow the order to have effect. The third is by CGI seeking leave to file an application for leave to apply for leave to appeal out of time.

[2] At the hearing of Trident's application, CGI conceded that the order of **Sir Marston Gibson CJ** was a nullity and its application for variation of that order was denied. The third application is the matter with which we are principally concerned in this judgment. When these applications were heard, the question of costs was reserved to be dealt with in this judgment.

FACTUAL BACKGROUND

[3] Both Trident and CGI are insurance companies registered in Barbados under the **Companies Act, Cap. 308**. They carry on as their principal business the offering of property, motor and accident insurance and reinsurance services respectively.

[4] BICO Ltd (BICO) entered into two contracts of insurance with Trident. The first, numbered BD/FC/003680, covered the risk of fire and allied perils on

BICO's premises, ("the fire policy") and the second, numbered BD/FC/003681, covered BICO's business interruption risks ("the business interruption policy").

[5] Trident, in turn, entered into a local facultative reinsurance contract, numbered AA1973 and dated 4 August 2009, with CGI in respect of the fire policy. Under that reinsurance contract, CGI agreed to reinsure 30% of the risk of fire and allied perils undertaken by Trident under contract of insurance BD/FC/003680 subject to the terms and conditions of the fire policy. Under another local facultative reinsurance contract, numbered AA1983 and dated 4 August 2009, CGI agreed with Trident to reinsure 30% of business interruption risks subject to the terms and conditions of a business interruption policy numbered BD/FC/003681.

[6] Subsequent to the issuance of the reinsurance policies, a fire occurred at BICO's premises. The fire was caused by the use of an arc welding plant on BICO's premises. The fire resulted in loss and damage to BICO. Trident requested reinsurance recoveries in respect of this loss and damage from CGI in the amount of $2,720,599. 38.

[7] Prior to the institution of an action by Trident on 22 December 2009 in the High Court against CGI in respect of the requested reinsurance recoveries, CGI paid to Trident the sum of $658,080.66 leaving an outstanding balance

at that time of $2,062,487.72. Some 8 days after the claim form was filed, CGI paid the sum of $1,300,000.00 to Trident in respect of the outstanding balance as claimed in the said claim form.

[8] As set out in its statement of claim, Trident contends that it has honoured its obligations to BICO. Accordingly, Trident is claiming recovery in the High Court from CGI of the outstanding balance of reinsurance recoveries owed it by CGI.

PROCEDURAL BACKGROUND

[9] The statement of claim in this matter was filed on 17 May 2010. The defence was duly filed on 12 July 2010 and a case management conference held on 16 November 2010. Trident filed its witness statements on 14 February 2011 as ordered. CGI at that time had not complied with the order to file its witness statements by 14 February 2011. In March 2011, CGI duly applied for an amendment of its defence and this amended defence was filed on 27 April 2011.

[10] On 21 June 2011, the pre-trial review was held and CGI was granted an extension of time to file the relevant witness statements by 1 July 2011. It is to be noted that since 29 March 2011, the parties were notified that the date of hearing was set for 14 and 15 September 2011.

[11] By application made on 13 September 2011, less than 24 hours prior to the trial date set for the hearing of the matter, CGI sought leave to further amend its defence pursuant to **rule 20.1 (2)** of **Supreme Court (Civil Procedure) Rules, 2008 (CPR)**. This Rule states:

> "The court may give permission to amend a statement of case at a case management conference, or at any time after a case management conference, upon an application being made to the court."

It is to be noted that **rule 2.3** of **CPR** provides that a statement of case includes a defence.

[12] The grounds of the application were, inter alia, that:

> (a) "A fire occurred at the insured's premises after arc welding work was carried out there by subcontractors."
>
> (b) "Since the filing of this matter, the Defendant has discovered that the arc welding equipment was stationed at and formed part of the insured's premises in its workshop."
>
> (c) "The Defendant would seek to plead a counterclaim of avoidance based on misrepresentation or non-disclosure of material facts and seek reimbursement of all monies paid to the Claimant under the reinsurance policy."

[13] The application was supported by two affidavits of Mr. Peter Vivek Harris, General Manager of CGI, filed on 13 and 14 September 2011 respectively. In seeking to explain the basis of the application to amend and the

counterclaim, Harris deposed that, during the process of drafting witness statements:

> "Our attorneys-at-law reviewed copies of the pleading namely the statement of claim and Defence in the matter between BICO and Qualtech Services Inc., HCCV 435/2010, and it became apparent that there was an arc welding plant and that the Commercial Building Fire Investigation Report of Forensic Consultants Inc. and the report of the Loss Adjusters DC Craig Associates never indicated that the arc welding plant formed part of the Insured's premises."

CGI's application to amend the day before the trial was opposed by Trident. The matter was heard on 14 and 15 September 2011 before **Worrell J**. On 28 March 2014, **Worrell J** delivered his judgment in which he dismissed CGI's application with costs to Trident.

[14] In March 2014, **Worrell J**, with the agreement of the parties, set the matter down for hearing in May 2014. In May 2014, CGI indicated that its senior attorney-at-law was not available. Consequently, the matter was adjourned to 7, 8, 9, 10 and 11 July 2014.

[15] On 16 May 2014, CGI filed a claim form and statement of claim commencing an action as CV 771/2014 against Trident. In this action CGI claimed:

> "…rescission of the reinsurance contract…made between the Defendant and the Claimant in writing: for the return of $2,458,080.60 being money paid the Defendant to the Claimant thereunder: and interest thereon' Alternatively damages for

> misrepresentation made by the Defendant to the Claimant in failing to fairly present the risk and/or failing to represent the precise nature of the risk ceded under the reinsurance contracts: and interest thereon…"

[16] By notice of application filed on 12 June 2014, CGI applied to the court in CV 573/2010 for an order that "CV No 771/2014 intituled CGI Consumers' Guarantee Insurance Company Limited v. Trident Insurance Company Limited is consolidated with the present claim…" CGI later filed an application on 13 June 2014 that Trident's statement of case in CV No 771/2014 intituled "CGI Consumers' Guarantee Insurance Company Limited v. Trident Insurance Company Limited" be struck out.

[17] In the meantime, on 9 June 2014, CGI made an application to this Court under **rule 62.6 (3)** that "the time for the defendant to file and serve a notice of appeal against the decision of the Honourable **Mr. Justice Worrell**, Judge of the High Court entered on March 28, 2014 is extended."

[18] On 18 June 2014, **Sir Marston Gibson CJ**, sitting as a single judge, granted, without hearing on that application, the following order:

> "Upon this application for leave to appeal today coming on for consideration…it is ordered pursuant to the Supreme Court (Civil Procedure) Rules Rule 62.6 (3) and (4) the Application is granted and the defendant is permitted to file and serve a Notice of Appeal against the decision of the Honourable Mr. Justice Worrell, Judge of the High Court entered on March 28, 2014 by 11th July 2014."

[19] On 4 July 2014, Trident applied to this Court for an order that "the order of **Honourable Sir Marston Gibson, Chief Justice** made without a hearing on 18th June 2014…Be set aside and/or discharged and such further and other orders as the Court deems just."

[20] Pursuant to the order of 18 June 2014 made by **Sir Marston Gibson CJ**, CGI filed and served a notice of appeal on 11 July 2014 against the decision of **Worrell J** given on 28 March 2014.

[21] Meanwhile, on 7 July 2014, the matter came on for trial before **Worrell J**. At that time, CGI applied for a stay of the proceedings pending the appeal allowed by the order of **Sir Marston Gibson CJ**. This application was heard by **Worrell J** on 8 July 2014. The decision on the stay was set to be given by **Worrell J** on 16 July 2014 and on 22 July 2014, the stay was in fact granted by **Worrell J**.

[22] Further to Trident's application of 4 July 2014 that the order of **Sir Marston Gibson CJ** "be set aside and/or discharged", CGI filed an application on 16 July 2014 for orders that:

> "i. the Appellant if required to have leave to appeal from the decision of the Honourable Mr. Justice Randall Worrell, Judge of the High Court entered on March 28, 2014.
>
> ii. The Order of the Honourable Sir Marston C. D. Gibson, Chief Justice made without hearing on June 18, 2014 be varied:

(1) By adding the words "has leave and" immediately after the word "defendant" and the words "and 62.6(3)" after the word "(4)" in paragraph 1 thereof, so that paragraph 1 would read as follows:

"1. Pursuant to the Supreme Court (Civil Procedure) Rules, 2008, Rule 62.2(3) and (4) and 62.6(3), the Application is granted and the defendant has leave and is permitted to file and serve a Notice of Appeal against the decision of the Honourable Mr. Justice Randall Worrell, Judge of the High Court entered on March 28, 2014 by 11th July 2014."

(2) That the Notice of Appeal filed herein on the 11th July 2014 do stand.

(3) No order as to costs."

It is to be remembered that a notice of appeal had been filed by CGI on 11 July 2014.

[23] On 19 September 2014, Trident's application of 4 July 2014 and that of CGI of 16 July 2014 came on for hearing before this Court. At the hearing, counsel for CGI conceded that the order of the Honourable Chief Justice was made without jurisdiction. Accordingly, this Court granted the application of Trident and discharged the order of the Honourable Chief Justice.

[24] At the hearing also, this Court heard and dismissed CGI's application on the basis that the amendments to the order of the Honourable Chief Justice sought in that application were premature. This Court held that this was so

because the appeal sought to be brought by CGI was, as admitted by CGI, an interlocutory appeal. By the operation of **section 54 (1) (g)** of **The Supreme Court of Judicature Act, Cap. 117A (Cap. 117A)** and **rule 62.2 (1)** of **CPR**, CGI was required to apply for leave to appeal the order of **Worrell J** within 21 days of that order. CGI had not complied with that requirement and would not be allowed to circumvent it by an amendment seeking an extension of time to file an appeal under **rule 62.6 (3)**. Nevertheless, this Court ordered that, in all the circumstances of the case, CGI be at liberty to apply for leave as required by **section 54 (1) (g)**.

ISSUES BEFORE THIS COURT

[25] The principal issues with which we are now concerned arise from the application of CGI made pursuant to the order that "CGI be at liberty to apply for leave as required by **section 54 (1) (g)**".

[26] That application was filed by CGI on 3 October 2014, and was titled "NOTICE OF APPLICATION FOR LEAVE TO APPEAL OUT OF TIME". In it, CGI applied for the following orders:

> "i. That the above-named defendant/intended appellant do have leave to appeal out of time notwithstanding that the time limited for so doing had expired against the decision of the Honourable Mr. Justice Randall Worrell, Judge of the High Court given on March 28, 2014 whereby it was adjudged that the defendant not be permitted to re-amend its defence and to plead a counterclaim;

ii. That the application for leave to appeal out of time be treated as the hearing of the appeal;

iii. And that the costs of this application be costs in the appeal."

[27] It is clear from this application that five broad issues are now raised for our determination. These are (i) whether the application which was filed is an application for leave as is required by **section 54 (1)(g)** and **rule 62.2** (the application for leave issue); if it is, whether this Court has jurisdiction to hear it (the jurisdiction issue); (iii) whether, if this Court has jurisdiction, leave in this case should be granted (the leave issue); (iv) whether the application "for leave to appeal out of time be treated as the hearing of the appeal" (the application as the appeal issue); and (v) what order, if any, should be made as to costs (the costs issue).

[28] We consider these issues seriatim hereafter.

THE APPLICATION FOR LEAVE ISSUE

[29] The intended appeal by CGI is against an interlocutory order of **Worrell J**. Consequently, CGI must obtain leave to appeal. This is so because **section 54 (1)(g)** of **Cap. 117A** provides that:

"No appeal lies to the Court of Appeal

(g) without the leave of the judge or of the Court of Appeal, from any interlocutory order or judgment made or given by a judge of the High Court…"

All of this is agreed on all sides.

[30] Meanwhile, **rule 62.2** outlines the procedure which must be followed in obtaining leave as required by **section 54 (1)(g)**. **Rule 62.2 (1)** provides as follows:

> "(1) where an appeal may be brought only with the leave of the court below or the Court of Appeal, a party wishing to appeal must apply for leave within 21 days of the order against which leave to appeal is sought."

[31] It is clear from this rule that the real problem for CGI is that the time within which an application for leave may be made has expired. Accordingly, to satisfy the **section 54 (1)(g)** requirement, CGI must seek to apply for leave to file an application for leave to appeal out of time in disregard of **rule 62.2 (1)**. This is not the application before the Court. The application before us is for "leave to appeal out of time notwithstanding that the time limited for so doing had expired" and as such the application should be dismissed without more.

[32] In **Ifill v Attorney General et al (Civil Appeal No. 3 of 2013)**, this Court summarised the overriding objective of **CPR** as the establishment of procedural rules which ensure the just, speedy and inexpensive determination of the substantive issue in every proceeding. In pursuance of this objective which is mandated by **rule 1.2** of **CPR**, this Court is prepared

to consider CGI's application as an application to file an application for leave to appeal out of time. So treating this application leads to the second issue, the jurisdiction issue, namely, whether this Court has jurisdiction to extend the time for filing an application for leave to appeal in disregard of **rule 62.2 (1)**.

THE JURISDICTION ISSUE

[33] Mr. Haynes QC contends that this Court may assert jurisdiction to extend the time limit imposed by **rule 62.2 (1)** on either one or all of three bases. These are (i) under **rule 26.4** of **CPR**; and/or (ii) under **section 61** of **Cap. 117A**; and/or (iii) under **rule 62.1 (2)** of **CPR**.

[34] We will consider each of these separately and in turn.

Under Rule 26.4 of CPR

[35] First, Mr. Haynes QC argues that **rule 26.4** of **CPR** affords this Court the jurisdiction to extend the time for filing an application for leave to appeal. In assessing this argument, it becomes important to cite **rule 26.4** *in extenso*.

Rule 26.4 reads as follows:

> " (1) This rule applies in relation to a matter in respect of which an order has not been sought, or if sought, has not been made under rule 26.3 striking out a statement of case or part of a statement of case.

> (2) An error of procedure or failure to comply with a rule, practice direction or court direction or order does not invalidate any step taken in the proceedings unless the court so orders.
>
> (3) Where there has been an error of procedure or failure to comply with a rule, practice discretion, court order or direction, the court may make an order to rectify the error or failure.
>
> (4) The court may make such an order on or without an application by a party."

[36] We must confess our significant difficulty in finding the jurisdiction alleged by Mr. Haynes QC in this rule. This is especially so since **rule 26.4** is found in **Part 26** of **CPR** which is titled "Case Management - The Court's Powers" and so is restricted in operation by this context. This is furthermore so since **rule 26.4 (1)** expressly restricts the operation of **rule 26.4** to "a matter in respect of which an order has not been sought, or if sought, has not been made under **rule 26.3** striking out a statement of case or part of a statement of case".

[37] Our difficulty has not been allayed by Mr. Haynes QC's contention that **rule 26.4** is "equivalent" to Rule 26.8 in the Eastern Caribbean CPR. That rule deals explicitly and generally with applications for relief from any sanction imposed for a failure to comply with any rule, order or direction. In our view, that rule is patently different from **rule 26.4** and the admittedly

impressive jurisprudence developed in EC courts on it is largely unhelpful in interpreting **rule 26.4**.

[38] Our overall conclusion on the contention that **rule 26.4** affords jurisdiction to extend the time for leave to apply for leave to appeal is that that contention cannot be supported. This conclusion is inevitable on a proper interpretation of that rule within the context of **CPR**.

Under Section 61 of Cap. 117A

[40] The second submission of Mr. Haynes QC is that this Court has jurisdiction to extend the time to apply for leave to appeal under **section 61** of **Cap. 117A**. This section decrees that:

> "…for all the purposes of and incidental to the hearing or determination of any appeal against any decision or determination of a court, tribunal, authority or person, in this section referred to as "the original court", and the amendment or enforcement of any judgment or order made thereon, the Court of Appeal has, in addition to all other powers exercisable by it, all the jurisdiction of the original court."

[41] Mr. Haynes QC submits that the High Court, the original court in this intended appeal, has jurisdiction to extend the time for applying for leave to appeal under **rule 26.4** of **CPR** and that that jurisdiction flows through to this Court consequent upon **section 61**. This submission is, in our view, not supported. As has been seen, the simple fact is that neither **rule 26.4** nor any other rule or law confers jurisdiction on the High Court to extend the

time for leave to apply for leave to appeal to the Court of Appeal. The High Court has no such jurisdiction. There can therefore be no flow through of a non-existent jurisdiction in the High Court to this Court by virtue of the operation of **section 61**.

Under Rule 62.1 (2) of CPR

[42] The third contention advanced by Mr. Haynes QC on the jurisdiction issue, is that this Court may find a jurisdiction to extend the time limit imposed by **rule 62.2 (1)** in **rule 62.1 (2)** of **CPR**. **Rule 62.1 (2)** provides as follows:

> "Without limiting its powers conferred otherwise, the court may direct a departure from this Part whenever that is required in the interests of justice."

[43] In approaching the interpretation of this sub-rule, it is important to remember that **CPR** is a complex set of strict procedural rules with the overriding objective of ensuring the just, speedy and inexpensive determination of the substantive issue in every proceeding. To counter-balance these strict rules, **CPR** contains particular rules conferring discretion on courts to allow relaxation of particular strict rules in specified circumstances. Those rules are intended to secure a fair balance between the right to the determination of the substantive issue in the proceeding and the

expenditure of time and money needed to achieve that determination. Such rules may therefore be conveniently referred to as balancing rules.

[44] In our view, **rule 62.1 (2)** is a balancing rule. It confers on this Court discretion to depart from the strict rules in **Part 62** "whenever that is required in the interests of justice". Accordingly, we agree with Mr. Haynes QC that this Court has jurisdiction in a proper case to invoke **rule 62.1 (2)** and direct a departure from any rule in **Part 62**, including **rule 62.2 (1)**.

THE LEAVE ISSUE

[45] Given the foregoing, the crucial question for us now becomes whether this is a proper case in which to invoke **rule 62.1 (2)** and direct a departure from **rule 62.2 (1)**. Stated simply, the question is whether we should direct a departure from **rule 62.2 (1)** and allow CGI to file an application for leave to appeal at this time.

[46] In approaching that question, we consider it important to make three general observations in relation to **rule 62.1 (2)** at the very outset. The first is that, pursuant to **rule 2.1**, the criteria for exercise of the **rule 62.1 (2)** discretion must be guided by the overriding objective of **CPR**, namely, enabling the court to deal with cases justly. The second is that, given the overriding objective of **CPR**, the exercise of this Court's discretion under **rule 62.1 (2)** is exceptional in its nature and that there is a presumption in favour of strict

adherence to the stipulated requirements in **Part 62**, and in particular **rule 62.2 (1)**. The third is that, on the plain words of **rule 62.2 (1)**, the critical consideration in deciding on the exercise of that discretion is whether or not it is required "in the interests of justice".

[47] What therefore is meant by "in the interests of justice" for purposes of **rule 62.1 (2)**?

[48] **CPR** itself does not elaborate on the specific factors or circumstances that should be taken into account in the consideration of an "in the interests of justice" issue for purposes of **rule 62.1 (2)**. In our view, the stance taken by **CPR** of not stipulating factors to be taken into account is perfectly understandable, for one lesson which experience very clearly demonstrates is that each "in the interests of justice" situation is different. Another demonstrable lesson from experience is that the approach taken in any given decided case is bound to offer only limited clarification of "in the interests of justice" in the abstract. Accordingly, the approach taken by this Court to **rule 62.1 (2)** in any particular case must depend upon the totality of the facts and circumstances of that case.

[49] The foregoing does not mean that determination of an "in the interests of justice" issue under **rule 62.1 (2)** can be an arbitrary exercise. In considering the totality of the facts and circumstances in any case, there are

always certain explicit factors or indicia, none of which by itself can be treated as determinative, which this Court must take into account.

[50] In this regard, we agree with Ms. Woodstock-Riley QC that, in an "in the interests of justice" determination in relation to an application for leave to appeal in disregard of **rule 62.1 (2)**, assistance may be garnered from both pre-CPR and post-CPR authorities as to the explicit factors to which this Court should have regard. These factors include things such as the conduct of the parties in helping the court to further the overriding objective of **CPR** as required by **rule 1.3**, the length of the delay, the explanation for the length of such delay, the chances of success on appeal and any prejudice to either party which might result from the grant or refusal of leave. We hasten to emphasise by repeating that these factors must be considered in the overall context of the case in question and that no one factor can be determinative.

[51] Applying those principles to the case at bar, we are not satisfied that disregard of **rule 62.2 (1)** "is required in the interests of justice" for a number of reasons. First, we consider that what emerges from the procedural history of this case is that CGI has not been helpful to the court in furthering the overriding objective of **CPR** as required by **rule 1.3**. We note, as an example, that CGI was, in its own words, "surprised" at the order made by **Sir Marston Gibson CJ** granting it leave to file an

appeal out of time. This "surprise" notwithstanding, CGI did not approach the Honourable Chief Justice for a clarification of that order but proceeded to file a notice of appeal pursuant to that order! As another example, we note that CGI, while admitting that the intended appeal is an interlocutory appeal and may only be brought with leave of this Court, has not to date filed any application for leave of this Court to appeal as is required by **section 54 (1) (g)** and **rule 62.2 (1).**

[52] Second, we consider length of the delay in this case and the reasons given for that delay. In respect of delay, we note that CGI's first attempt at filing an application for leave to appeal was on 9 June 2014, some 78 days after the delivery of the judgment by **Worrell J** on 28 March, 2014. Indeed, the present application which was filed on 3 October 2014 was filed 190 days after the said judgment.

[53] It must be remembered that this is an appeal from an interlocutory decision of **Worrell J**. In our view, in principle such appeals should not be so drawn out as to affect the effective and expeditious determination of the substantive matter. The stipulation in **rule 62.2 (1)** of 21 days within which to file such an appeal is undoubtedly an expression of this principle. Consequently, the reasons which may excuse a delay in filing contrary to **rule 62.2 (1)** will only avail where those reasons are entirely convincing: see **Ratnam and**

City Printery Ltd v. Gleaner Co. Ltd (1968) 13 WIR 126 at **258 (J'ca CA)** per Zacca P (actg).

[54] The reasons given by CGI for its delay in observing **rule 62.2 (1)** are far from legally convincing. For example, the affidavit of Ms. Faye Finisterre, counsel for CGI, filed on 3 October 2014 gives as a reason for the delay at paragraphs 8 and 12 that she was required to travel to St. Lucia twice to attend to a "pending Court matter". As to this reason, we would only say that the authorities are undivided that the fact that a litigant's attorney was otherwise engaged is never accepted by this Court as a good reason for granting an extension of time: see, e. g., **Credit Agricole Indosuez v The Owners of the Vessel European Vision et al HC Suit No. 1345A of 2004**; **McDougal v Romain Civil Appeal No. 3 of 2008 (Dominica CA); Johnson v Gore Wood and Co. [2001] 2 WLR 72, 90B (Eng CA)** per Lord Bingham.

[55] Another example of a similarly unconvincing reason given by CGI is that the written judgment was not received until 22 May 2014. As to this, counsel for CGI was aware prior to 28 March 2014 that **Worrell J** was delivering his decision on that date. What is more, the affidavit of Ms. Finisterre filed on 3 October 2014 deposes at paragraphs 5, 6 and 7 that she was present in court and took notes of the delivery of the decision; that

the indication of the court was that a copy of the decision would be available by "Wednesday"; and that she anticipated that they would be able to discuss the merits of such an application in depth on review of the decision.

[56] We note that **rule 42.8** of **CPR** provides that:

> "A judgment or order takes effect on and from the day it is given or made, unless the court specifies that it is to take effect on a different date."

We note further that **rule 42.2** provides that:

> "A party is bound by the terms of the judgment or order whether or not the judgment or order is served where that party
>
> > (a) is present whether in person or by a legal practitioner when the judgment is given or the order is made; or
> >
> > (b) is notified of the terms of the judgment or order by telephone, FAX, email or otherwise."

It is clear from these rules that CGI could have made an application for leave to appeal at the hearing of 28 March 2014 before the High Court judge.

[57] The efficacy of such an application is explained in **The White Book paragraph 52.3.4** as follows:

> "Despite the lack of compulsion, a litigant with arguable grounds of appeal would generally be well advised to apply for permission to the lower court at the time of judgment for five reasons: (a) the judge below is fully seised of the matter and so

> the application will take minimal time. Indeed the judge may have already decided that the case raises questions fit for appeal. (b) An application at this stage involves neither party in additional costs. (c) No harm is done if the application fails. The litigant enjoys two bites at the cherry. (d) No harm is done if the application succeeds, but the litigant subsequently decides not to appeal. (e) If the application succeeds and the litigant subsequently decides to appeal, he avoids the expensive and time consuming permission stage in the appeal court. It should be noted that the guidance in this paragraph was firmly endorsed by the Court of Appeal in T (A Child) [2002] EWCA Civ 1736."

[58] Third, we turn to the question of whether the appeal has a realistic prospect of success. Before doing so, however, it may be advantageous to remind ourselves that the intended appeal is against the exercise of his discretion by **Worrell J** not to allow a late application to make significant amendments to CGI's defence and to counterclaim against Trident the day before trial. In considering whether the applicant's intended appeal has a realistic prospect of success, this Court must therefore have regard to the appellate function in respect of an appeal against the exercise of its discretion by a trial court.

[59] In its numerous decisions including **Locke v. Bellingdon Limited (Civil Appeals Nos. 31 and 34 of 2001 unreported), Toojays Ltd v Westhaven Ltd (Civil Appeal No. 14 of 2008)**, and **Cellate Caribbean Ltd v Harlequin (Civil Appeal No. 3 of 2011)**, this Court accepted the statement of law by Lord Woolf MR in the English Court of Appeal decision of

Phonographic Performance Ltd v AEI Rediffusion Music Ltd [1999] 1 WLR 1507, 1523-D (citing Stuart-Smith LJ in **Roache v News Group Newspapers Ltd [1998] EMLR 161**) on the appellate function in respect of an appeal to an appellate court against the exercise of a discretion by a trial court that:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or has taken into account, some feature that he should, or should not have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

[60] Other regional courts of appeal have also embraced this principle. Thus, for example, de la Bastide CJ in the Trinidad and Tobago Court of Appeal decision in **Jetpak Services Ltd v BWIA International Airways Ltd (1998) 55 WIR 562** at **568** stated: "It is only in the circumstances where the exercise of the judge's discretion is based on a misunderstanding or misapplication of either the law or the evidence that an appellate court is entitled to set aside the exercise of the judge's discretion and exercise an independent discretion of its own."

[61] Given the undisputed state of the law, the only question as to whether it is appropriate in the circumstances of this case for this Court to interfere with the exercise of discretion by **Worrell J** is whether he acted on a

misunderstanding or misapplication of either the law or the evidence in the exercise of his discretion in refusing the grant of the amendment and counterclaim. This Court is entirely satisfied that he did not.

[62] From **paras 11** to **40** of his judgment, the judge correctly identified the legal principles that govern the exercise of his discretion on whether or not to grant an amendment. True, he did not enter into an extensive discussion of the English case authority cited before us by CGI. But that was not necessary, as it is now generally accepted that the relevant legal principles are amply ventilated in the judgment of Walter LJ in the English Court of Appeal case of **Worldwide Corporation Limited v GPT Limited, GPT (Middle East) Limited [1998] EWCA Civ 1894** on which he relied. Indeed, having correctly identified the correct principles, between **paras 22** and **26**, he painstakingly considered, assessed and evaluated the evidence in light of those principles.

[63] Given the foregoing, it is clear that CGI's intended appeal against the exercise of his discretion by **Worrell J** does not have a realistic chance of succeeding. In our view, CGI will not be able to surmount the hurdle of showing that **Worrell J's** decision was, in the words of de la Bastide CJ, "based on a misunderstanding or misapplication of either the law or the

evidence that an appellate court is entitled to set aside the exercise of the judge's discretion and exercise an independent discretion of its own".

[64] Finally, we would observe that proceedings in this matter were commenced in 2010. Five years have elapsed and the matter is still to be finally resolved. Granting the leave sought by CGI would result in further delay of the trial and final determination of the substantive matter. This would not only have detrimental commercial consequences for Trident but would contribute to the much talked about problem of delay in our civil justice system.

[65] We note that this discussion does not differentiate between delay in respect of **CPR** cases and delay under the civil justice system that **CPR** was introduced to reform. In the very recent CCJ cases of **Walsh v Ward [2015] CCJ 14 (AJ) (Walsh v Ward)** and **Canadian Imperial Bank of Commerce v Gypsy International Ltd and Royston Beepat [2015] CCJ 16 (AJ) (Gypsy)**, for instance, the CCJ excoriated the civil justice system in Barbados for inordinate delays in the resolution of cases. Unfortunately, in our respectful view, the CCJ did not underline that the substantial part of the delay in those cases occurred under civil procedure rules which were everywhere in common law world recognised as productive of delays in civil cases and which rules were everywhere in common law jurisdictions

repealed and replaced by civil procedure rules modelled on the Woolf rules. In fact, when once **Walsh v Ward** and **Gypsy** were transitioned to the new **CPR** regime, these cases were dealt with fairly expeditiously. So that the discussion of delays in the civil justice system continues, as it were, to visit the sins of the fathers unto the third and fourth generations!

[66] We are ever mindful of our duty to ensure that delay does not become a feature of our civil justice system under **CPR.** We are enjoined to apply **CPR** in furtherance of its overriding objective. So applying **CPR**, we are not satisfied that this is a case which warrants invoking **rule 62.1 (2)** to direct a departure from the requirements of **rule 62.2 (1)**.

THE COSTS ISSUE

Some General Considerations

[67] The costs in this case are in relation to three applications for orders made during the course of proceedings and are not intended to decide the rights of the parties, but are made for the purpose of keeping things in status quo til rights can be decided. **Rule 11.1** of **CPR** implies that interlocutory applications are applications "for court orders…made before during or after the course of proceedings". A more expansive description of interlocutory injunctions is to be found in the old English Court of Appeal case of **Gilbert v Endean (1878) Ch D 259** at **268**, where Cotton LJ stated that

applications are "…considered interlocutory which do not decide the rights of the parties, but are made for the purpose of keeping things in status quo till rights can be decided, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties". The applications in this case are therefore interlocutory applications.

[68] **Section 85** of **Cap. 117A** confers a general discretion on this Court in respect of awarding costs as follows:

> "Subject to rules of court, the costs of and incidental to all proceedings in the High Court and the Court of Appeal, ... are in the discretion of the Court and each court has power to determine by whom and to what extent the costs are to be paid."

However, specific rules governing the exercise of the **section 85** discretion are contained in **rule 65.11** of **CPR** under the heading "Assessed costs of procedural applications".

[69] **Section 12 (2)** of the **Interpretation Act, Cap. 1** stipulates that, *inter alia*, headings in an enactment shall not be construed as part of the enactment and shall be deemed to have been inserted for convenience of reference only. Thus, the reference to "procedural applications" in the heading to **rule 65.11** cannot be interpreted as affecting the unambiguous language of **rule 65.11 (1)** that **rule 65.11** is intended to deal with assessed costs in

interlocutory applications. Accordingly, the three applications before us being interlocutory applications, costs must be assessed in accordance with **rule 65.11**.

Basic Approach in Assessing Costs

[70] **Rule 65.11 (1)** lays down the basic procedure which a court must adopt in assessing costs in an interlocutory application. That rule provides as follows:

> "(1) On determining any interlocutory application except at a case management conference, pre-trial review or the trial, the court must
>
> (a) decide which party, if any, should pay the costs of that application;
>
> (b) assess the amount of such costs; and
>
> (c) direct when such costs are to be paid."

[71] It is clear from this provision that the court must take a three-step approach in assessing costs. First, the court must decide which party, if any, should pay the costs of that application. This may be conveniently labelled the entitlement to costs determination. Second, the court must assess the amount of such costs. This may be referred to as the assessment of costs determination. Third, the court must direct when such costs are to be paid.

[72] We now turn to applying this approach to the case before us.

Entitlement to Costs

[73] The rules governing the determination of the entitlement to costs are contained in **rule 65.11 (2) and (3)** of **CPR**. These provide as follows:

> "(2) In deciding which party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party.
>
> (3) The court must however take account of all the circumstances including the factors set out in rule 64.6(5) but where the application is one that could reasonably have been made at a case management conference or pre-trial review, the court will order the applicant to pay the costs of the respondent unless there are special circumstances."

[74] **Rule 65.11 (2)** contains a general rule that the unsuccessful party must pay the costs of the successful party. Application of this rule to the case at bar would result in costs being payable by CGI to Trident. However, in their written submissions to, and oral arguments before, this Court, CGI contended that "having regard to all the circumstances of the two applications for which costs are in issue" the general rule should not be applied in this case "but that this Court should invoke **rule 64.6 (2)** and **(3)** and make an alternative costs award".

[75] As regards CGI's contention, we would observe *en passant* that **rule 64**, including **64.6 (2)** and **(3)**, the rule relied on by CGI, make provision for entitlement to recover costs generally and that **rule 65.11 (2)** and **(3)**

stipulate special rules for entitlement to costs in procedural applications. In our view, **rule 65.11 (2)** and **(3)** are the rules which allow for alternative awards in interlocutory applications. As has been seen, **rule 65.11 (2)** decrees that the general rule in procedural applications is that "the unsuccessful party must pay the costs of the successful party" and **rule 65.11 (3)** mandates that this Court "take account of all the circumstances including the factors set out in rule 64.6(5)" in deciding whether or not to apply the general rule.

[76] **Rule 64.6(5)** reads as follows:

> "(5) Without limiting the factors which may be considered, the court must have regard to
>
> (a) the conduct of the parties both before and during the proceedings;
>
> (b) whether a party has succeeded on particular issues, even if not ultimately successful in the case, although success on an issue that is not conclusive of the case confers no entitlement to a costs order;
>
> (c) whether it was reasonable for a party to
>
> (i) pursue a particular allegation; or
>
> (ii) raise a particular issue
>
> and whether the successful party increased the costs of the proceedings by the unreasonable pursuit of issues;

(d) the manner in which a party has pursued

(i) the case;

(ii) a particular allegation;

(iii) a particular issue

and whether that manner increased the costs of the proceedings; and

(e) whether the claimant gave reasonable notice of an intention to pursue the issue raised by the application."

[77] As mandated by **rule 65.11 (3)**, we have had close regard to the facts and circumstances of this case and can find nothing that would justify us in not applying the general principle in **rule 65.11 (2)** in this case. In particular, we have had regard to the conduct of both parties before and during the proceedings; the success of the parties on particular issues; the manner in which both parties pursued their applications; the fact that Trident gave reasonable notice to CGI of an intention to pursue the issue raised by the application that the **Sir Marston Gibson CJ's** order was made without jurisdiction; and that CGI objected to the application to have the order discharged and instead made a separate application requesting that the order be varied, ultimately conceding that the order the Honourable Chief Justice was made without jurisdiction.

[78] In light of all these considerations, we hold that the general principle in **rule 65.11 (2)** should be applied. Accordingly, Trident, being the successful party in both applications, is entitled to costs payable by CGI.

Assessment of Costs to be Paid

[79] Having determined that Trident is entitled to their costs, we now turn to assessing the amount of those costs.

[80] As already noted, the three applications with which the costs issue arise are interlocutory applications. The assessment of the amount of costs in interlocutory applications in this Court is governed by **rule 65.11 (4)**, **(5)**, **(6)** and **(7)**. These provide as follows:

> "(4) In assessing the amount of costs to be paid by any party, the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable.
>
> (5) A party seeking assessed costs must supply to the court and to all other parties a brief statement showing
>
> (a) the disbursements incurred;
>
> (b) the attorney-at-law's fees incurred; and
>
> (c) how that party's attorney-at-law's costs are calculated.
>
> (6) The statement under sub-rule (5) must comply with any relevant practice direction.

> (7) The costs allowed under this rule may not exceed one tenth of the amount of the prescribed costs appropriate to the principal application unless the court considers that there are special circumstances of the case justifying a higher amount."

[81] In our judgment, there are three basic requirements to which this Court must have regard in assessing the amount of costs to be paid by any party that are established by these rules. The first is the obligation on this Court to take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and to allow such sum as it considers fair and reasonable. The object of this requirement is to fix a fair and reasonable sum for disbursements incurred and for attorney-at-law's fees.

[82] The second is that the party seeking assessed costs must supply to the court and to all other parties a brief statement showing (a) the disbursements incurred; (b) the attorney-at-law's fees incurred; and (c) how that party's attorney-at-law's costs are calculated. The purpose of this requirement is to facilitate the court's determination on evidence of whether the sum claimed for disbursements and attorney-at-law's fees in a given case is fair and reasonable.

[83] The third requirement relates to the quantification of the costs payable. It is that the costs allowed in an interlocutory application "may not exceed one

tenth of the amount of the prescribed costs appropriate to the principal application" unless the court considers that there are special circumstances of the case justifying a higher amount. The purpose of this requirement is to set a cap on the costs that may actually be recovered in respect of a given application. Its effect is that, absent special circumstances, costs recoverable equal the fair and reasonable sum allowed by the court up to "one tenth of the amount of the prescribed costs appropriate to the principal application".

[84] As regards the first requirement, counsel for Trident represents that they "spent 66 hours and 5 minutes preparing and attending Court". For professional charges in relation to this time and for disbursements, the sum of $44,084.15 is claimed. Counsel for CGI dispute this time representation, contending that the applications are relatively straightforward and did not reasonably necessitate the time claimed by counsel for Trident.

[85] We disagree with counsel for CGI. In our judgment, the representation as to the time spent by counsel for Trident appears to us to be reasonable and the sum claimed to be fair and reasonable. The three applications in this case involved the relatively untrammelled areas of the jurisdiction of a single judge of appeal under Barbados law and, *inter alia*, the novel question of the power of this Court to extend the time for filing an application for leave to appeal. The written submissions by counsel on these were very substantial,

extremely well researched and supported by all relevant authorities. We are of the view that a significant portion of time must have been reasonably spent in researching, digesting and writing these submissions which were of enormous assistance to this Court.

[86] As regards the second requirement, it is to be noted that there is no "relevant practice direction" on what form the statement must take. In these circumstances, counsel for Trident has sought to satisfy this second requirement in an "Applicant's Statement of Account" exhibited as LF9 in the Affidavit of Lydia Farley filed on 17 October 2014. In our view, this satisfies the second requirement.

[87] The critical consideration which a court must address in approaching the third requirement is this: what is "the prescribed costs appropriate to the principal application"? The meaning of this formulation is far from clear. The problem is that the key to the operation of the prescribed costs regime is the determination of "the value of the claim": see **rule 65.5 (1) and (2)**. It is only after the "value of the claim" is determined that the scale stipulated in **Appendix B** can be applied to "the value of the claim" to arrive at the appropriate prescribed costs.

[88] Given the foregoing, prescribed costs may only be logically expressed as being appropriate to the claim. Thus, without more, the phrase "the

prescribed costs appropriate to the principal application" in **rule 65.11 (7)**, is ambiguous and capable of a number of alternative meanings, one of which, for example, is that the phrase has no meaning. In these premises, the principle of construction *ut res magis valeat quam pereat*, is apposite. That principle of construction was expressed by Viscount Simon LC in the English House of Lords in **Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014** at **1022** as follows:

> "Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."

Shannon Realities Ltd v Ville de St Michel [1924] AC 185 at **192, 193** per Lord Shaw is also to the same effect.

[89] Invoking that principle of construction in approaching the phrase "the prescribed costs appropriate to the principal application" in **rule 65.11 (7)** supports an interpretation of "the principal application" as referring to "the principal claim". The value of the claim for purposes of prescribed costs is then to be regarded as the amount claimed in the claim form. The prescribed costs appropriate to that amount are then calculated in accordance with the scale in **Appendix B**. Save where there are special circumstances justifying

a higher amount, costs are ultimately allowed so as not to exceed one tenth of the costs calculated in accordance with **Appendix B**.

[90] This is the approach adopted by counsel on both sides to **rule 65.11 (7)** in this case. Counsel for Trident contends that costs should be quantified both in relation to Trident's claim as well as CGI's counterclaim. In relation to Trident's claim, counsel submit that the value of the claim currently stands at $1,228,766.19. This is made up of the balance of $762,478.70 after giving credit to amounts tendered by CGI to, and accepted by, Trident and an amount representing the "amount due since filing of the statement of claim". The prescribed costs on this sum are $103,362.99. One tenth of this figure amounts to $10,336.30 and counsel argue that this is the amount to which they are entitled in respect of Trident's claim.

[91] Counsel for CGI accept the claim of $762,478.70 representing the balance after giving credit to amounts tendered by CGI to, and accepted by, Trident as "the minimum amount on which the parties have consensus in their statement of case". They do not deny the claim for an "amount due since filing of the statement of claim". Instead, they argue in their written submissions that such amount cannot be included in the value of the claim since:

> "…this additional amount of $886,896.37 ought to have properly been the subject of an amendment to the Statement of Claim. Alternatively, the documents on which the Claimant/Intended Respondent relies in support of the amounts claimed ought to have, in line with **CPR Part 8.5(2)**, been either identified or annexed to the statement of case as being documents necessary to its case."

Accordingly, they contend that the value of the claim should be $762,478.70. Applying **Appendix B**, the prescribed costs on this figure are $84,623.94. One tenth of this is $8,462.39 and this, they argue, is the maximum amount to which Trident is entitled.

[92] We agree with counsel for CGI that the value of claim in respect of Trident's claim should be $762,478.70. Trident filed no documents in support of its statement of claim but did set out in paragraph 6 of the statement of claim the details of the facultative notices of loss and requests for recovery made by it. On the other hand, while its reply contained appendices with documents showing the monies paid by CGI and a letter in respect of the VAT claimed, there were no documents relating to the new and additional amounts claimed to be due. For this reason, the additional amount of $886,896.37 ought not to be included in the value of claim in respect of Trident's claim.

[93] Applying **Appendix B**, the prescribed costs on $762,478.70 which is the value of claim in respect of Trident's claim are $84,623.94. One tenth of

this is $8,462.39 and this is the maximum amount to which Trident is entitled in respect of Trident's claim.

[94] In relation to CGI's counterclaim, we accept counsel for Trident's proposal that the value of this counterclaim is $2,458,080.60. The prescribed costs on this sum are $133,371.21 one tenth of which is $13,337.12 and this is the costs to which they are entitled. We observe that the submissions of counsel for CGI are silent on this claim.

[95] Given the foregoing, the maximum amount of costs recoverable by Trident is $8,462.39 + $13,337.12 = $21,799.51. Trident's costs may not exceed this amount unless this Court considers there are special circumstances of the case justifying a higher amount. So are there special circumstances in this matter?

[96] Counsel for Trident argue that the continued actions of CGI in this matter, including using the order of **Sir Marston Gibson CJ** of 18 June 2014 to apply for and obtain a stay of the trial despite having notice that the order was made without jurisdiction constitutes circumstances justifying a higher amount. We do not agree with counsel. In our view, "special circumstances" for purposes of **rule 65.11 (7)** are "circumstances" which would immediately strike a reasonable Bajan as "special". The circumstances identified by Trident do not bear this badge.

DISPOSAL

[97] For all the foregoing reasons:

(i) the application is disallowed; and

(ii) CGI is ordered to pay costs to Trident in the amount of $21,799.51 in 28 days from the date of this judgment.

Justice of Appeal

Justice of Appeal

Justice of Appeal